Supreme Court, U. S.
FILED
DEC 27 1976
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-885

AMANDA ALICE SPILLMAN,

Petitioner,

v.

THE CITY OF DALLAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

WALLER M. COLLIE, JR.,
Fidelity Union Tower,
Dallas, Texas 75201,

WILLIAM ANDRESS, JR.,
1313 Two Turtle Creek Village,
Dallas, Texas 75219,

Attorneys for Petitioner.

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THE CITY OF DALLAS,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas, which was entered in the above entitled case on 11 March 1976, the motion for rehearing on application for writ of error having been denied by the order of the Supreme Court of Texas on 29 September 1976.

CITATIONS TO OPINIONS BELOW

The opinion of the Texas Court of Civil Appeals for the Eleventh Supreme Judicial District dated 11 March 1976, reported at 535 S.W. 2d 717, is printed in Appendix A attached.

JURISDICTION

The judgment of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas was entered on 11 March 1976. Motion for rehearing thereon having been denied, Petitioner's application to the Supreme Court of Texas for a writ of error timely filed was thereafter refused on 7 July 1976, and Petitioner's motion for rehearing thereon was denied by the Supreme Court of Texas on 29 September 1976 (Appendix B) which returns the record to the Court of Civil Appeals and makes its judgment final.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257(3).

QUESTIONS PRESENTED

1. Whether the action of the trial court in discharging the jury and rendering a judgment for an inadequate amount in a condemnation case, based upon expert testimony alone, denies to Petitioner her right of trial by jury.

2. Whether the Court's judgment without a jury of $62,274 for the land taken, compared to the rejected expert valuation of $661,988, deprives Petitioner of her private property without just compensation.

3. Whether the action of the trial court in refusing Petitioner the same right to fill her lowlands as nineteen other landowners similarly situated had been permitted to do, and thereby secure the added value of her land in condemnation, discriminates against her and deprives her of equal protection of the law, when done under the guise of an ordinance of the City of Dallas, an arm of the State of Texas, which was never introduced in evidence and is not a part of the record.

4. Whether the action of the State of Texas, acting through the City of Dallas and its courts, in refusing Petitioner the right to show the value of filled lands because of an unproven ordinance of the City of Dallas,

discharge of the jury and rendition of judgment fixing a factual value of lands by the Court, and misquoting the record on appeal as "instructing a verdict," deprives Petitioner of her property without due process.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved herein are Amendment V, Amendment VII, and Amendment XIV, Section 1, to the United States Constitution, and Article I, Sections 15 and 17, of the Texas Constitution, and Rule 324 of the Texas Rules of Civil Procedure, the texts of which are re-printed in the attached Appendix C.

STATEMENT OF THE CASE

Petitioner owned 14.4 acres of land in the City of Dallas, 1.9 acres of it fronting 176 feet on a commercial thoroughfare and used for business purposes, the remaining 12.49 acres widening out and sloping down to a major creek wandering through the City. The City of Dallas as a part of a Green Belt project of parkways in flood lands adjacent to creeks, undertook condemnation proceedings against Petitioner for the 12.49 acres. The right of the City to condemn the property was not in dispute.

A jury was empanelled and Petitioner undertook to establish value. Her expert engineering witness testified without objection that 9.4 acres was so close to the upper limit of the flood plain that it was feasibly fillable to be satisfactory for its highest and best use as commercial property, which could be done in an orderly and inexpensive fashion over a three year period, leaving 3.1 acres undisturbed in the flood plain which would not affect the flood water capacity of the creek.

A real estate expert, Daniel Levy, testified as to his knowledge of transactions and improvements up and down the flood plain of White Rock Creek for miles in each direction from Petitioner's land, marking on an aerial photo-

graph in evidence nineteen locations where substantial improvements had been made on filled land salvaged from overflow with the permission of the City of Dallas, and he testified that based on prior use history and all reasonable probability similar permission would be granted to Petitioner as had been granted these nineteen other landowners similarly situated.

When this qualified real estate expert began to testify about comparable sales and his opinions of value, the trial court admitted one comparable value at $2 per square foot. Then the City of Dallas objected to the comparable sales and opinion on the grounds that Petitioner's property was subject to a Flood Plain ordinance of the City of Dallas and could not be filled. The ordinance was never introduced in evidence, a requirement under Texas law as we hereinafter show, but the trial court rejected the comparable sales and the opinion evidence based thereon, which appears in the bill of exceptions in the record (Appendix D), the expert's opinion valuation being $661,988 as filled land for commercial use or $1.58 per square foot. The only evidence which the trial court permitted to be heard by the jury was this same expert's testimony that in its raw state as flood land, the land was worth 11.3¢ per square foot for a total of $62,274.

At the conclusion of Petitioner's testimony, consisting exclusively of expert opinion evidence, the trial court discharged the jury and rendered judgment herself as a matter of law (Appendix E).

Under Texas law, in a non-jury case where there is no jury verdict, no motion for new trial is necessary for an appeal from errors in admissibility of evidence, under Rule 324 (Appendix C). Nevertheless, although the jury had been discharged and never acted, on appeal by this Petitioner the Court of Civil Appeals erroneously stated that the judgment was based on a jury verdict which would have required a motion for new trial, and because Petitioner had not filed a motion for new trial, she was thereby deprived of her right

to complain of the rejection of her evidence and the minuscule judgment, less than ten per cent of the value of the property.

In her motion for rehearing and application for writ of error and motion for rehearing thereon, Petitioner complained of the violation of her constitutional rights, the taking of her private property without just compensation, denial of her right to trial by jury, and denial of due process of law, under the Texas Constitution, the provisions of which are substantially the same as those of the Constitution of the United States (Appendix C).

Nevertheless, the Supreme Court of Texas refused to exercise its discretionary right to review the judgment of the Court of Civil Appeals, refusing the application for writ of error, with the notation, "no reversible error", which under Texas law means that the Supreme Court agrees with the result but not necessarily with the reasoning expressed in the opinion, and then overruled Petitioner's motion for rehearing on the application, making it a final judgment in her favor for the relative pittance.

It is in this posture that the case comes to this Court.

REASONS FOR GRANTING THE WRIT

1. The right of trial by jury in civil cases is a valuable constitutional right guaranteed both by Amendment VII to the United States Constitution and Section 15 of Article I of the Texas Constitution found in Appendix C, and reading approximately the same: "In suits at common law * * * the right of trial by jury shall be preserved * * *" and "the right of trial by jury shall remain inviolate."

In Texas, the right of trial by jury in condemnation cases on appeal from an award of Commissioners is tried as any other civil case and the condemnee is therefore entitled to trial by jury of the amount of the award. Article 3266, Revised Civil Statutes of Texas; *Central Power & Light*

Company vs. Freeman, 431 SW 2d, 897, 899, Corpus Christi Court of Civil Appeals 1968, writ refused, no reversible error.

This Court has zealously guarded that right. *Dimick vs. Schiedt*, 293 U.S. 474, 478, in 1934; 79 Law Edition at 607. This means that questions of fact must be decided by a properly constituted jury. *Patton vs. United States*, 281 U. S. 276, 288, in 1930; 74 Law Edition at 858.

The trial judge did not instruct a verdict. She actually discharged the jury and made a finding, purportedly as a matter of law upon the fact questions raised exclusively by expert testimony. Excerpts from the Statement of Facts, the Texas phraseology for transcript of the evidence, shown in Appendix E hereto, reveal precisely that this was not a directed verdict, and that in fact the jury was completely discharged and never acted, precisely as though jurors had never been present in the Court room during the trial. The only evidence heard during the case was from two experts: an expert engineer, Hanszen, to the effect that the Petitioner's property could feasibly be filled and used as up-lands, and the real estate appraisal expert whose opinion evidence of the value of the property for its highest and best use as filled commercial land in the amount of $661,988 was rejected by the trial court, whereas his opinion of the valuation of the property in its existent raw state as flood land without filling it for its highest and best use in the amount of $62,274 was accepted conclusively by the trial court and not submitted to the jury to pass upon whether they would or would not believe and follow the opinion of the expert.

Expert testimony has uniformly throughout this country been considered as a question of fact to be determined by the jury, and not as conclusive and binding upon any one. *Market Street Railway Company vs. Railroad Commission of the State of California*, 324 U.S. 547, 560, in 1945; 89 Law Ed. at 1181. The Fifth Circuit in cases arising in Texas has expressly held on several occasions that opinions of value are not binding. *Express Publishing Company vs. Commissioner of Internal Revenue*, 143 Fed. 2d. 386 (1944); *Scott v.*

United States, 146 Fed. 2d. 1313 (1945). This is true even when the opinion evidence of experts is not contradicted. *Mound Company vs. Texas Company*, 298 Fed 2d. 905 (1962), certiorari denied, 371 U.S. 817.

All of the other Circuits are in accord: District of Columbia, *Obold vs. Obold*, 163 Fed. 2d. 32 (1947); First, *Public Service Company of New Hampshire vs. Elliott*, 123 Fed. 2d. 2 (1941); Second, *Hecht Levis & Kahn vs. New Zealand Insurance Company*, 121 Fed. 2d 442 (1941); Third, *Neville Coke & Chemical Company vs. Commissioner of Internal Revenue*, 148 Fed. 2d. 599, certiorari denied, 326 U.S. 726 (1945); Fourth, *Automatic Cigarette Sales Corporation vs. Commissioner of Internal Revenue*, 243 Fed. 2d. 825, certiorari denied, 352 U.S. 951 (1956); Sixth, *Empire Oil & Refining Company vs. Hoyt*, 112 Fed. 2d. 356 (1940); Seventh, *Tripp vs. Commissioner of Internal Revenue*, 337 Fed. 2d. 432 (1964); Eighth, *United States vs. 3698.63 Acres of Land*, 416 Fed. 2d. 65 (1969); Ninth, *Goldstein vs. Commissioner of Internal Revenue*, 298 Fed. 2d 562 (1962); and Tenth, *Insurance Company of the State of Pennsylvania vs. Smith*, 435 Fed. 2d 1029 (1971). As recently as last September, the Texas Courts have again so held. *Southwestern Bell Telephone Company vs. Ramsey*, 542 S.W. 2d. 466, 474, Tyler Court of Civil Appeals: "It has generally been held in condemnation cases that opinion evidence as to value is not conclusive. A jury may consider and accept or reject such opinions or it may find its own opinion from other evidence such as comparable sales, or by utilizing its own experience in matters of common knowledge."

Accordingly, there was a fact question to be passed upon, the landowner had the right to have that fact question of value passed upon by a jury, and she was denied that right.

2. Both the United States Constitution and the Texas Constitution protect a citizen's right to retain his private property against public use without being compensated for it. The United States Constitution provides that private property shall not be taken for public use, "without just compensation," while the Texas Constitution provides that no

person's property shall be taken for public use "without adequate compensation." (Appendix C). The difference is semantic and not a distinction.

This Court has often held that just compensation "means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." *United States vs. Miller*, 317 U.S. 369, 373, in 1942; 87 Law Ed. at 342. Citing and following it at the same term this Court said that "that value may reflect not only the use to which the property is presently devoted but also that use to which it may be readily converted," in *United States vs. Powelson*, 319 U.S. 266, 275; 87 Law Ed. 1397. This is essentially the doctrine of "highest and best use," which prevails in Texas.

It was reiterated by this Court after quoting at length from Miller, in *United States vs. Reynolds*, 397 U.S. 14, 17, in 1970, 25 Law Ed. 2d. at 16: "Fair market value is generally to be determined with due consideration of all available economic uses of the property at the time of the taking." Both the majority and the dissent agreed upon these principles in *Almota Farmers Elevator & Warehouse Company vs. United States*, 409 U.S. 470, in 1972; 35 Law Ed. 2d. 1, agreeing that just compensation meant the full monetary equivalent of the property taken, the concept of which was fair market value.

During the course of the trial the highly qualified real estate expert Daniel Levy then testified at length as to his knowledge of the entire North Dallas region in which this land lies, and also as to his knowledge of transactions and improvements up and down the flood plain of White Rock Creek for miles in each direction from this Petitioner's land. He produced an aerial photograph of the region, and then proceeded to mark nineteen instances of where substantial improvements had been made on filled land salvaged from overflow with the permission of the City of Dallas. He concluded this phase of his testimony by the firm statement that based on prior use history, in all reasonable probability

this Petitioner's land would have been usable as commercial property, and any municipal restrictions against such use would be changed as they had been changed for the nineteen other owners of land similarly situated, which he had examined and testified about piecemeal, and which had no substantial difference from this Petitioner's property. He then attempted to testify about comparable sales and his opinion derived therefrom as to the value of this Petitioner's property, but after admitting one comparable value at $2 per square foot, the trial court then began sustaining an objection made by the City of Dallas that this Petitioner's land was zoned under a Flood Plain ordinance which prevented her from filling her land without application for permit and removal of the Flood Plain ordinance restriction, but this ordinance was never introduced in evidence, and as we show under the next segment of our argument, Texas Courts do not take judicial notice of municipal ordinances, which must be proven as any other fact. This was frequently called to the attention of the trial court, but she took judicial notice of the ordinance nevertheless, and refused to let Levy testify. Accordingly, his testimony of value was preserved in a bill of exceptions (Appendix D) which never went to the jury before the jury was discharged from the case. The only value evidence which the trial court did admit, and upon which she made her finding as a matter of law, was Levy's opinion that in its raw state, and not valued at its highest and best use, it was worth $62,274. This figure of $62,274 for which judgment was given is 11.3¢ per square foot, or slightly better than 7% of Levy's opinion of its value for its highest and best use, of $1.58 per square foot, still substantially less than the only admitted comparable, for a valuation of $661,988 for the highest and best use of this Petitioner's land.

We submit that this tremendous discrepancy between the market value about which the expert testified in the bill of exceptions, and which, if this case had not been seized from the jury, the jury could have believed, and the picayune amount granted by the trial court when she took it upon

herself to invade the province of the jury, is a clear showing that this Petitioner's land was taken from her without either just compensation of adequate compensation.

3. The expert real estate witness Levy testified from long experience and personal knowledge, on maps and aerial photographs, that throughout the winding White Rock Creek valley, in which this Petitioner's land lies, on nineteen different occasions, for nineteen different landowners, the City of Dallas had permitted lowlands to be filled and become uplands out of the flood plain, and that in all reasonable probability, there being no difference in circumstances of this land from those nineteen instances, this Petitioner could have done likewise. However, the City of Dallas insisted that it had enacted what is referred to as the Flood Plain ordinance, which was never introduced in evidence, and which provides for extensive and expensive engineering requirements before land subject to overflow may be filled to prevent it. As we have stated, this ordinance was never entered into evidence, there was constant objection to any reference to it unless and until it did become a part of the record, and yet the trial court gave it credence, and refused proffered testimony as to highest and best use and value.

In Texas, as in most jurisdictions, a municipal ordinance must be proven and introduced into evidence, and the Courts will not take judicial notice of it. *City of Austin vs. Walton*, 5 S.W. 70, Texas Supreme Court 1887; *City of Amarillo vs. Tutor*, 267 S.W. 697, Commission of Appeals to Texas Supreme Court 1924; *State ex rel Osborn vs. City of McAllen*, 91 S.W. 2d 688, Commission of Appeals to Supreme Court 1936. This is true even though witnesses were questioned about the ordinance and its effect on the property. *Urban Renewal Agency of the City of San Marcos vs. Bethke*, 420 S.W. 2d 803, Austin Court of Civil Appeals 1967, writ refused, no reversible error; *Ezzell vs. Texas Alcoholic Beverage Commission*, 528 S.W. 2d 888, Fort Worth Court of Civil Appeals 1975, no writ history.

That, of course, has also been the rule in the Federal Courts. *Gardner vs. Capital Transit Company*, 152 Fed. 2d

288 (Court of Appeals of the District of Columbia 1946), certiorari denied, 327 U.S. 795; *Dewell vs. Lawson*, 489 Fed. 2d 877 (Tenth Circuit 1974).

Inasmuch as the ordinance was never introduced into evidence, there was no opportunity for this Petitioner to challenge its unconstitutionality, as interfering with her constitutional right to use her lands and fill them, as this Court has held, as well as many other courts.

It has uniformly been held in this country that the owner of uplands and adjoining flood plain between high water mark and low water mark may reclaim his flood plain land by filling the flood plain above the high water mark line and using it, when there is no interference with navigation. That is the rule that this Court laid down in 1861 in *Richardson v. City of Boston*, 24 Howard 188, 16 Law Ed. 625: "As the City of Boston was owner of the soil between high and low water mark, it had equal right to reclaim the land as other owners; and having done so, a street or 'town way' might be established thereon." To the same effect is the decision of this Court in 1892 in *Illinois Central Railroad Company vs. People of the State of Illinois*, 146 U.S. 387, 36 Law Ed. 1018.

Other courts have similarly held, *Tiffany vs. Town of Oyster Bay*, 234 New York 15, 136 NE 224, New York Court of Appeals 1922; *Town of Orange vs. Resnik*, 109 Atlantic 864, Connecticut Supreme Court of Errors 1920. This latter case held that the owner of lowlands can only be deprived of his right to fill and make upland by condemnation, which precludes the right to do it by the so-called Flood Plain ordinance. That is in accord with the opinion of the Supreme Court of Texas in 1921, in *Spann vs. City of Dallas*, 235 S.W. 513: "Since the right to the citizen to use his property as he chooses so long as he harms nobody, is an inherent and constitutional right, the police power cannot be invoked for the abridgement of a particular use of private property unless such use reasonably endangers or threatens the public health, the public safety, the public comfort, or welfare."

Inasmuch, then, as this Petitioner had the same constitutional right to fill her lowlands and convert them into uplands as did the nineteen other persons shown to be similarly situated in the valley, the refusal to recognize that right of filling for highest and best use is discrimination against her for the right given nineteen others similarly situated, and deprives her of the equal protection of the law, when it is done under the guise or authority of an ordinance, never introduced in evidence, of the City of Dallas, which is an arm of the State of Texas.

4. Due process of law in a condemnation case in Texas after demand for jury requires a jury verdict to resolve fact issues raised by expert testimony as to the actual full monetary value of the land taken, as established by expert testimony offered in accordance with the rules of evidence. This process was shockingly ignored in the instant case, where the jury did not render a verdict, where a municipal ordinance was never introduced into evidence but was permitted to control valuation testimony, where the court herself rendered a judgment on the value only raising an issue of fact by expert testimony, thereby invading the exclusive province of the jury. By this decision of the County Court at Law of Dallas County, Texas, a court created by the State of Texas, the City of Dallas, a subdivision of the State of Texas, acquired Mrs. Spillman's land valued at $661,988, at a bargain price of $62,274, or seven cents on the dollar. Then, in order to make this violation of due process and the lack of just compensation stand up, the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas, another creation of the sovereign State of Texas, misquoted the record and improperly found that the trial court had instructed a verdict, thereby purportedly making a jury trial out of a farce expressly taken away from the jury, and construing that under Rule 324 of the Texas Rules of Civil Procedure, a motion for new trial was a *sine qua non* to complaining about the fundamental violation of this Petitioner's constitutional rights, and this again was upheld by another arm of the State of Texas, the Supreme

Court of Texas, in exercising its discretion to refuse to review the action of the Court of Civil Appeals.

When the Petitioner has been deprived of a jury verdict on the primary question in a condemnation case, just compensation or adequate compensation for the land taken from her, a purely semantical interpretation of Rule 324 is directly contrary to the provision for interpretation of the Texas Rules of Civil Procedure, contained in Rule 1, reading: "The proper objective of Rules of Civil Procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the State as may be practicable, these rules shall be given a liberal construction." Refusing to permit fundamental constitutional errors to be raised on a dogmatic interpretation of the right of appeal is denial of due process.

CONCLUSION

For each of the foregoing reasons, it is respectfully submitted the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

WALLER M. COLLIE, JR.,
Fidelity Union Tower,
Dallas, Texas 75201,

WILLIAM ANDRESS, JR.,
1313 Two Turtle Creek Village,
Dallas, Texas 75219,

Attorneys for Petitioner.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
CONTAINING APPENDIX A THROUGH APPENDIX E

APPENDIX A

In the
COURT OF CIVIL APPEALS
FOR THE ELEVENTH SUPREME JUDICIAL
DISTRICT OF TEXAS,
SITTING AT EASTLAND

No. 4875 — Appeal from Dallas County

AMANDA ALICE SPILLMAN,
Appellant,

v.

CITY OF DALLAS,
Appellee.

This is a condemnation case. The parties, Amanda Alice Spillman, condemnee, and City of Dallas, condemnor, stipulated the City had the right to condemn, and Spillman had the right to open and close. The condemned property consisted of approximately 12.84 acres which was to be used for laying out and enlarging the Greenbelt White Rock Creek Parkway. The property was adjacent to White Rock Creek and subject to flooding. Condemnee attempted to show that 9.4 acres could be "filled," and such reclaimed land used for commercial purposes. The Spillman tract was zoned "FPR75". Condemnee's appraisal witness testified that he was of the opinion the "R75" and the "flood plain designation", or "FP" could be changed and the property rezoned for commercial purposes. The witness was not permitted to give his opinion of the value of the property taken assuming the 9.4 acre tract was filled. The City objected to such testimony because the witness did not restrict the uses to which the property could be put under the "flood plain prefix", and there was no showing that the flood plain prefix would, or could be removed. The condemnee's appraiser

then testified that, considering the tract with no fill, and appraised only as flood land, the value was 11.1 cents per square foot. The appraiser was not permitted to testify as to the value of certain properties which condemnee contended were comparable. The City's Flood Plain Zoning Ordinance was never introduced in evidence.

After condemnee rested, the City filed a motion requesting the court to instruct a verdict, or remove the case from the jury, and enter judgment that condemnee recover of and from the City, the sum of $62,274 as the fair market value of the tract in question. The City's motion asserted that the $62,274 figure constituted the only evidence presented by condemnee, which was before the jury, as to the value of the land. The motion was granted.

Condemnee has appealed. We affirm.

Condemnee did not file a motion for new trial. All points of error relate to exclusion of evidence or matters other than the granting of the instructed verdict.

Rule 324, Texas Rules of Civil Procedure, provides in part:

> "In all cases tried in the county or district court, where parties desire to appeal from a judgment of the trial court, a motion for new trial shall be filed as a prerequisite to appeal; provided that neither a motion for new trial nor an assignment therein shall be a prerequisite to the right to complain on appeal of the action of the court in giving a preemptory instruction, or in withdrawing the case from the jury and rendering judgment, or in rendering or refusing to render judgment non obstante veredicto or notwithstanding the finding of the jury on one or more special issues, or in overruling a motion for judgment on the verdict made by the party who becomes appellant; * * *."

Where the court, in a jury case, grants an instructed verdict and an appeal is taken without filing a motion for new

trial, the appellant is limited on appeal to a complaint that the court erred in granting the instructed verdict.

In Wagner v. Foster, 341 S.W. 2d 887 (Tex. 1960), the court said:

> "The case was tried to a jury, and the first question to be decided is whether respondents-appellants were required by the Rules of Civil Procedure to file a motion for new trial and to preserve the error complained of * * *."
>
> "While trial court action denying a motion for judgment non obstante veredicto would seem, under the literal wording of Rule 324, to eliminate altogether the necessity for filing a motion for new trial as a prerequisite to appeal, except as to the matters designated in Rule 325, it was not so intended and it has not been and should not be so construed * * *. The purpose of the quoted provision of Rule 324 as it relates to a party whose motion non obstante veredicto is denied is to authorize appeal on the grounds stated in the motion without the necessity of incorporating the grounds in a motion for new trial. *It was not the purpose of that language to eliminate the necessity for complaining in a motion for new trial of other errors committed on the trial. A* party whose motion for judgment non obstante veredicto is denied may forego the filing of a motion for new trial and predicate his points of error on appeal on the matters included in such motion. *If he follows that course, he may complain on appeal only of the denial of the motion non obstante veredicto* * * *." (emphasis added)

In Goldring v. Goldring, 523 S.W. 2d 749 (Tex. Civ. App. — Fort Worth 1975, writ dism'd), the court withdrew the case from the jury and rendered judgment as a matter of law. Regarding the necessity of a motion for new trial, the court said:

> "Appellants in their 17th, 18th and 20th points of error complain of rulings of the trial court in either admitting or excluding evidence.

> We overrule all three of those points of error because none of the rulings therein complained of were assigned as error in a motion for new trial. Complaints of the action of a court in ruling on the admission or exclusion of evidence are waived when not based on a specific assignment of error in a motion for new trial. Prewitt v. Liberty Mutual Insurance Company, supra."

The court in Jamison v. City of Pearland, 489 S.W. 2d 636 (Tex. Civ. App. — Houston (1st Dist.) 1972, writ ref. n.r.e.), said:

> "Since appellants did not file a motion for new trial, they can only complain that the court erred in rendering judgment notwithstanding the verdict. The points raised in appellants' brief which are not related to the action of the court in granting the judgment non obstante veredicto cannot be considered. Points one, two, seven, eight and eleven complain of procedural matters and clearly are not related to such action of the court * * *."

See also: White v. Aetna Fire Underwriters Insurance Co., 503 S.W. 2d 653 (Tex. Civ. App. — Eastland 1973, no writ); Queen Insurance Company of America v. Creacy, 456 S.W. 2d 538 (Tex. Civ. App. — San Antonio 1970, no writ); Mitchell v. Porter, 349 S.W. 2d 785 (Tex. Civ. App. — Houston 1961, writ ref. n.r.e.); Miller v. Miller, 274 S.W. 2d 762 (Tex. Civ. App. — San Antonio 1954, writ ref'd.); Adcock v. Couser, 442 S.W. 2d 490 (Tex. Civ. App. — Waco 1969, no writ).

Condemnee's points of error were not properly perfected in a motion for new trial. They are overruled. Judgment of the trial court is affirmed.

AUSTIN MCCLOUD
Chief Justice

March 11, 1976

APPENDIX B

CLERK'S OFFICE — SUPREME COURT

Austin, Texas, Sept. 29, 1976

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of SPILLMAN v. CITY OF DALLAS, No. B-5999 was this day overruled.

Very truly yours,
GARSON R. JACKSON, *Clerk*

APPENDIX C

Constitution of the United States

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE [VII]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Constitution of Texas, Article I

§ 15. Right of trial by jury

Sec. 15. The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency. Provided, that the Legislature may provide for the temporary commitment, for observation and/or treatment, of mentally ill persons not charged with a criminal offense, for a period of time not to exceed ninety (90) days, by order of the County Court without the necessity of a trial by jury. As amended Aug. 24, 1935.

§ 17. Taking, damaging or destroying property for public use; special privileges and immunities; control of privileges and franchises

Sec. 17. No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof.

Texas Rules of Civil Procedure

Rule 324. Prerequisites of Appeal

In all cases tried in the county or district court, where parties desire to appeal from a judgment of the trial court, a motion for new trial shall be filed as a prerequisite to appeal; provided that neither a motion for new trial nor an assignment therein shall be a prerequisite to the right to complain on appeal of the action of the court in giving a peremptory instruction, or in withdrawing the case from the jury and rendering judgment, or in rendering or refusing to render judgment non obstante veredicto or notwithstanding the finding of the jury on one or more special issues, or in overruling a motion for judgment on the verdict made by the party who becomes appellant; nor shall a motion for new trial be required in a non-jury case or in a case where the appeal is based upon some error of the trial court arising after its action upon the motion for new trial. But motion for new trial shall be a necessary prerequisite to consideration of the complaints mentioned in Rule 325. When judgment is rendered non obstante veredicto or notwithstanding the finding of the jury on one or more special issues, the appellee may bring forward by cross-point contained in his brief filed in the Court of Civil Appeals any ground which

would have vitiated the verdict or would have prevented an affirmance of the judgment had one been entered by the trial court in harmony with the verdict, including although not limited to the ground that one or more of a jury's findings have insufficient support in the evidence or are against the overwhelming preponderance of the evidence as a matter of fact, and the ground that the verdict and judgment based thereon should be set aside because of improper argument of counsel. In the event appellee assigns error by cross-point based upon an alleged improper argument of counsel, he shall support the same by proper bill of exceptions. The failure to bring forward by cross-points such grounds as would vitiate the verdict shall be deemed a waiver thereof, save and except such grounds as require the taking of evidence in addition to that adduced upon the trial of the case. A motion for new trial shall not be necessary in behalf of appellee where he does not complain of the judgment or a part thereof. As amended by orders of March 31, 1941, effective Sept. 1, 1941; Sept. 20, 1941, effective Dec. 31, 1941; July 20,

BILL OF EXCEPTION
DIRECT EXAMINATION

By Mr. Collie:

Q. Mr. Levy, yesterday I believe I asked you a question, what in your opinion was the fair market value of the area indicated in blue on Defendant's Exhibit No. 1, which area has been testified by the witness Hanszen, as the area that could be filled to a level to remove it from the flood plain conditions. Will you give us your opinion as to the reasonable market value of the blue area when filled — (interposing) Just to be certain I understand, may I look at the area in blue?

Q. Yes.

A. I have valued that blue area, that 9.4 acres, taking into consideration the value of it, the reasonable probability of it, that it is a part that the whole tract available and adjacent to the front end use with the whole property as filled land, put an evaluation of $646,953.

Q. How much is that per square foot?

A. $1.58 a square foot.

Q. How much is it per acre?

A. I didn't value it on the acres —

Q. That's all right. Now, Mr. Levy, does that represent your opinion as to the fair market value of the land indicated in blue on Defendant's Exhibit 1 after it had been filled in the manner testified to by Mr. Hanszen?

A. Yes.

Q. Do you have an opinion as to the area which would not have been filled under Mr. Hanszen's diagram? In other words, the green area on Defendant's Exhibit No. 1.

A. Yes. sir, I do.

Q. What is that opinion?

A. That is the total figure of $15,035 based on 3.1 acres at $4,850 per acre.

Q. Then what would be your opinion as to the reasonable market value of the entire take area, assuming that the area designated by Mr. Hanszen in blue could be filled in such manner as to raise it above the flood plain level, that the area designated by Mr. Hanszen in green would remain unfilled in its present state, and considering the whole parcel as a portion of Mrs. Spillman's total property?

A. Considering it as filled land, $661,988.

Q. What would be the total amount of the entire taking?

A. The total amount of the total would be $661,988.

Q. Does that figure represent your opinion as to the fair market value of the take area on November 27, 1972, assuming that the area indicated by Mr. Hanszen could be filled and elevated above the flood level?

A. Yes, that's my value as filled land.

MR. COLLIE: Now, Your Honor, we tender all of this testimony and ask permission to put it on before the jury when the jury is returned.

THE COURT: I recognize that I previously instructed you to return a verdict of a stated amount. However, I have determined rather than having to go through that process, the Court can take the responsibility of entering judgment in this cause, and that is what I intend to do, ladies and gentlemen.

I have determined as I stated to you previously, your obligations and responsibilities as jurors, to determine the facts as they were presented to you. My responsibility as Judge is to determine the law — is to determine what I consider to be the law as it controls this case. We have reached a point in this law suit where I as the Judge have determined that the law controls rather than the facts, or that the law controls the facts that have been presented to you. Therefore, as I have stated, at this time I am going to excuse you as jurors and take on the responsibility of entering the judgment in this case as the Court believes the law applies to it.

It has been a privilege to have had you in the courtroom as jurors. I recognize that you have spent, since Monday, awaiting and in attendance, now to simply be excused without being able to render a verdict. I would hope that having been waiting, and having been in attendance will not for future cases cause you to feel that you do not wish to serve on a jury. Because, as I stated to you, previously, it is indeed a privilege to serve upon a jury. It is one that all people don't have, and the fact that this one has gone on to some other area that does not concern the jurors, still does not in any way mitigate the importance of your service as citizens of your country and your community.

You are excused, however, from this case. You are free for the remainder of the week.

(Whereupon, after the jury was excused, the following proceedings took place.)

THE COURT: The record does in fact reflect that the case has been withdrawn from the jury. The Court does

now enter judgment that the landowner recover of and from the City of Dallas the sum of $62,274.

MR. ANDRESS: To which the landowner excepts and gives notice to the Court of Civil Appeals for the Fifth Judicial District.

END OF PROCEEDINGS.

Supreme Court, U. S.
FILED
JAN 28 1977
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-885

AMANDA ALICE SPILLMAN,

Petitioner,

v.

THE CITY OF DALLAS,

Respondent.

On Petition for a Writ of Certiorari to the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas

BRIEF OF THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LEE E. HOLT, City Attorney
DOUGLAS H. CONNER,
Assistant City Attorney
501 Municipal Building
Dallas, Texas 75201
Attorneys for Respondent.

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS — (214) 742-4257

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LOWER COURT OPINIONS

The opinion of the Texas Court of Civil Appeals for the Eleventh Supreme Judicial District dated March 11, 1976, reported at 535 S.W.2d 717, is printed in Appendix A, Page 1 of Petitioner's Writ of Certiorari.

JURISDICTION

The judgment of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas was entered on March 11, 1976. Motion for rehearing thereon was then denied and Petitioner applied to the Supreme Court of Texas for writ of error. The Supreme Court of Texas denied Petitioner's writ of error and also denied Petitioner's motion for rehearing thereon on September 29, 1976. This returns the record to the Court of Civil Appeals and makes its judgment final.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C., §1257(3).

QUESTIONS PRESENTED BY PETITIONERS

I.

Whether the Supreme Court will review a state court decision which involves admissibility of evidence and preservation of error under state procedural law and which decision does not involve a federal question.

II.

Whether Petitioner has a federally guaranteed right to a jury trial in a state court proceeding.

STATEMENT OF THE CASE

In this condemnation case, tried before a jury, the right to take was stipulated with the only issue left for decision being the amount of damages to which Petitioner, the landowner, was entitled.

Petitioner's value testimony, considering the land as useable

for a purpose not legally permissible, was excluded. Petitioner then presented testimony as to the value of the land for uses legally permissible, which testimony was admitted. That was the only value testimony introduced in the trial of the case.

When Petitioner rested, Respondent moved the Court to instruct the jury to return a verdict for Petitioner for the amount of her value testimony, or in the alternative take the case from the jury and enter judgment for Petitioner for such amount. The Court granted the motion for instructed verdict. (Sf, p. 223) However, subsequently, the court withdrew the case from the jury and entered judgment for Petitioner for such sum, $62,274.00 (Sf, p. 231).

Petitioner appealed to the Court of Civil Appeals without first filing a Motion for new trial in the trial court, complaining of the exclusion of testimony by the trial court. The Court of Civil Appeals correctly held that Rule 324 of the Texas Rules of Civil Procedure (Petitioner's Appendix C-1) requires a party to file a motion for new trial in the trial court if complaint is made on appeal of evidentiary rulings. The Texas Supreme Court approved the Court of Civil appeals opinion by refusing to accept Petitioner's writ of error.

ARGUMENT AND AUTHORITIES

I.

THE UNITED STATES SUPREME COURT WILL NOT REVIEW A STATE COURT DECISION SUCH AS THE ONE PRESENTED BY PETITIONER IN WHICH THERE IS NO FEDERAL QUESTION.

The rule with respect to the United States Supreme Court reviewing state court decisions has been settled for many years. The requirements are that (1) the federal question arose in the state court, (2) the federal question was decided by the state court, (3) the federal question must have been decided in order to induce the judgment, and (4) that it is not sufficient to show that the question might have arisen and been applicable, unless it is further shown that it was applied by the state court. *Crowell v. Randell,* (1836) 10 Pet (U.S.) 368, 9 L.Ed. 458.

The Court has subsequently said that where a state court decision "might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it." *Williams v. Kaiser,* 323 U.S. 470, 89 L.Ed. 398; *Stembridge v. Georgia,* 343 U.S. 541, 96 L.Ed. 1130. In the later case of *Durley v. Mayo,* 351 U.S. 277, 100 L.Ed. 1178, the Court goes even further and says that ". . . petitioner, in order to establish our jurisdiction, must demonstrate that neither of these state grounds can account for the decision below." Thus it is that Petitioner has the burden of affirmatively showing that a state court decision was based necessarily on the decision of a federal question.

Applying the law established by these cases to the present situation the Respondent would point out that the decision in the state court, not only could have been based on a state ground, but

by that court's pronouncement was in fact based on Texas procedural law. Rule 324 of the Texas Rules of Civil Procedure (Petitioner's Appendix C-2) provides that as a prerequisite to appeal of a trial court decision in a case tried to a jury, a party must file a motion for new trial in the trial court setting out that party's points of error. This prerequisite applies to all error except the trial court's action in rendering judgment, instructing a verdict or in rendering or refusing to render judgment non obstante verdicto.

The Texas Supreme Court in *Waggoner v. Foster,* 341 S.W.2d 887 (1960), interprets that exception to mean that if a party wishes to appeal the granting of a motion for judgment non obstante verdicto, he may do so, but he may complain only of that action. The Court says,

> "It was not the purpose of that language to eliminate the necessity for complaining in a motion for new trial of other errors committed on the trial."

In an opinion regarding Petitioner's case written by the Court of Civil Appeals (Petitioner's Appendix A) and approved by the Texas Supreme Court, the Court of Civil Appeals states:

> "Condemnee did not file a motion for new trial. All points of error relate to the exclusion of evidence or matters other than the granting of the instructed verdict."

Then, after reviewing Texas procedural law regarding the necessity of filing a motion for new trial, the court concludes by saying,

> "Condemnee's points of error were not properly perfected in a motion for new trial. They are overruled. Judgment of the trial court is affirmed."

Therefore it is obvious that no federal question was either

presented to, considered by, or necessary for the Texas Appellate Court decision of Petitioner's case. That decision was based entirely upon Texas procedural law and upon Petitioner's failure to adhere to the appellate procedure established by Texas legislative and judicial pronouncements. Petitioner's rights have not been denied if the state provides the means for Petitioner to be heard and Petitioner chooses not to utilize that means.

II.

THE PETITIONER HAS NOT BEEN DENIED HER RIGHT OF TRIAL BY JURY BECAUSE AMENDMENT VII TO THE UNITED STATES CONSTITUTION DOES NOT APPLY TO STATES AND IT IS NOT MADE APPLICABLE TO THE STATES BY AMENDMENT XIV TO THE UNITED STATES CONSTITUTION.

Amendment VII of the United States Constitution does not require that trials in state courts be by jury. *Walker v. Sauvinet,* 92 U.S. 90, 23 L.Ed. 678. The United States Supreme Court in *Hardware Dealers Mutual Fire Insurance Co. v. Glidden,* 284 U.S. 149, 76 L.Ed. 214, held as follows:

> "The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure. (citing cases) In the exercise of that power and to satisfy a public need, a state may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and the opportunity to be heard."

The Petitioner, therefore, cannot complain that she has been denied a federally guaranteed right to a trial by jury in a state court since that right does not exist. The United States Supreme Court has consistently declined to declare the Seventh Amendment of the United States Constitution applicable to the states through the due process clause of the Fourteenth Amendment. Furthermore, the Respondent contends that the trial court's instructing a verdict is a judicial function required by the weight and sufficiency of evidence of each individual case. This function has been approved by the Supreme Court and compared to the trial court's exercising its discretion as to relevancy or materiality of evidence. *Galloway v. U.S.,* 319 U.S. 371, 87 L.Ed. 1458; *Wagner Electric Mfg. Co. v. Lyndon,* 262 U.S. 225, 67 L.Ed. 961. The Petitioner cannot complain that she was denied her right to trial by jury if, after she had presented all her admissible evidence to a jury, the trial court recognized that there was no question of fact for the jury to decide and therefore instructed a verdict. Since this verdict has been upheld by the highest appellate court in the state, the Petitioner cannot now seek federal review of state procedural law by calling it denial of trial by jury.

CONCLUSION

Respondents respectfully submit that the Petitioner has not shown that she is entitled to the relief requested in her petition for the following reasons:

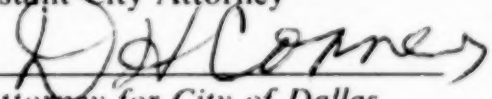
(1) Petitioner has not shown that the outcome of her case was based on the decision of a federal question.

(2) Petitioner does not have a federally guaranteed right to a jury trial in a state court proceeding.

WHEREFORE, PREMISES CONSIDERED, Respondents pray that this Court deny Petitioners' Writ of Certiorari.

Respectfully submitted,

LEE E. HOLT, City Attorney
DOUGLAS H. CONNER,
Assistant City Attorney

By 
Attorney for City of Dallas
501 Municipal Building
Dallas, Texas 75201
748-9711, Ext. 294